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In the Supreme Court of the United States

OCTOBER TERM, 1977

ABRAHAM BEAME, ET AL., PETITIONERS

v.

FRIENDS OF THE EARTH, ET AL.

HUGH L. CAREY, ET AL., PETITIONERS

v.

FRIENDS OF THE EARTH, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1718

ABRAHAM BEAME, ET AL., PETITIONERS

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* This brief was filed with this Court and served in typewritten form on August 3, 1977. The only substantive changes appearing in this printed brief are footnote 2, *infra*, and the second sentence of paragraph 2 on page 4, *infra*.

OPINION BELOW

The opinion of the court of appeals is reported at 552 F.2d 25 and is reproduced as Appendix I to the petition in No. 76-1718.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1977 (No. 76-1718, Pet. App. I, 1-3), and a timely petition for rehearing was denied on March 4, 1977 (No. 76-1718, Pet. App. II, 62-66). The petition for a writ of certiorari in No. 76-1718 was filed on June 2, 1977. The petition for a writ of certiorari in No. 76-1737 was filed on June 6, 1977.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provisions of a Transportation Control Plan, prepared by the State of New York with the cooperation of the City of New York and approved by the Environmental Protection Agency pursuant to Section 110 of the Clean Air Act can be enforced against the State and the City in a "citizen suit" under Section 304 of the Act.

STATUTES INVOLVED

The relevant provisions of the Clean Air Act are reproduced in the Appendix, *infra*.[2]

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[1] See page 12, *infra*.

[2] Quotations herein from the Clean Air Act do not reflect the Clean Air Amendments of 1977, signed on August 7, 1977. Those Amendments do not affect any issues in this case.

STATEMENT

1. The Administrator of the Environmental Protection Agency (EPA) is directed by the Clean Air Act, 77 Stat. 392, as amended and added, 42 U.S.C. (and Supp. V) 1857 *et seq.* (the Act), to establish standards governing maximum concentrations of particular pollutants in the air (Section 109, 42 U.S.C. 1857c-4). On April 30, 1971, the Administrator promulgated national primary and secondary air quality standards for those pollutants resulting chiefly from motor vehicle emissions. 36 Fed. Reg. 8186. Thereupon, it became the responsibility of each state government to "specify the manner in which * * * air quality standards will be achieved and maintained" within the state (Sections 101(a)(3), 107(a), 42 U.S.C. 1857(a)(3), 1857c-2(a)).

Under the Act, each state must submit to the Administrator a plan for "implementation, maintenance and enforcement" in that state of the national primary and secondary standards (Section 110(a)(1), 42 U.S.C. 1857c-5(a)(1)). These implementation plans provide the regulatory scheme for controlling emissions from stationary and moving sources of pollution to the extent necessary to attain the national standards. The required elements of a state implementation plan include, *inter alia*, such methods of pollution control "as may be necessary * * *, including, but not limited to, land-use and transportation controls" (Section 110(a)(2)(B), 42 U.S.C. 1857c-5(a)(2)(B)), and a procedure for "inspection and testing of motor vehicles" (Section 110(a)(2), (G), 42 U.S.C. 1857c-5(a)(2)(G)).

The Administrator's approval or disapproval of an implementation plan is subject to judicial review pursuant to Section 307(b), 42 U.S.C. (and Supp. V) 1857h-5(b), which provides that a petition for review of the Administrator's action "shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day." That section also provides that actions of the Administrator with respect to which review could have been obtained under the section shall not be subject to judicial review in civil or criminal proceedings for enforcement. In addition, Section 304 of the Act, 42 U.S.C. 1857 h-2, authorizes "citizen suits," whereby "any person" may commence a civil action against any federal, state or local instrumentality for violating a provision of a state implementation plan.

2. The New York State Implementation Plan was submitted to EPA on January 31, 1972, and approved by the Administrator on May 31, 1972, pursuant to Section 110(a)(2) of the Clean Air Act, 42 U.S.C. 1857c-5(a)(2). This plan did not contain transportation control measures. On April 17, 1973, the State of New York, after consultation with petitioners in No. 76-1718 (hereafter "City petitioners"), submitted its Transportation Control Plan (Plan), including a plan to control motor vehicle pollution in the New York City metropolitan area. The Plan submitted by the state was approved by the Administrator on June 22, 1973, with minor exceptions.

3. Within the 30-day statutory deadline provided in Section 307(b)(1), 42 U.S.C. (and Supp. V) 1857h-

5(b)(1), respondents challenged the Administrator's approval of the Plan in the court of appeals. The primary challenges related to the vagueness of portions of the Plan, and the failure of the state to begin its implementation. The court upheld the plan in all substantial respects, remanding only for further explanation of certain points. The court held, however, that it lacked jurisdiction to order the state to implement the Plan in a Section 307 proceeding. *Friends of the Earth* v. *Environmental Protection Agency (Friends I)*, 499 F.2d 1118 (C.A. 2).

On October 11, 1974, respondents filed a "citizen suit" under Section 304(a) of the Act, seeking a mandatory injunction against appropriate state and city officials requiring compliance with the New York Plan. The district court denied the request for injunctive relief in light of the "total lack of expertise in the court" and "the existence of a federal agency with such expertise charged with the enforcement of the highly technical and difficult problems involved." *Friends of the Earth* v. *Wilson*, 389 F. Supp. 1394, 1395 (S.D. N.Y.). The court noted, however, that "the State and City do not found their opposition to the preliminary injunction on the grounds that they are in compliance"; that, in fact, counsel for the State "stated in open court * * * that 'this plan is a legally enforceable plan, is a legally adequate plan and that the state is committed [obligated] to fulfilling its responsibilities thereunder'" (*id.* at 1395). "He went on to say," the court noted further, "that the State apparently had no intention of implement-

ing certain strategies of the plan and observed, 'If there is a valid legal ground for such a refusal, we have not been able to find it, your honor.'" *Ibid.*

After EPA found that the State and City were in violation of certain aspects of the Plan, respondents returned to the district court seeking a preliminary injunction against both state and city officials ordering Plan enforcement. On August 28, 1975, the district court denied the request for relief, *Friends of the Earth* v. *Carey*, 401 F. Supp. 1386 (S.D. N.Y.).

The court of appeals reversed. *Friends of the Earth* v. *Carey (Friends II)*, 535 F.2d 165 (C.A. 2). It held that once a suit is commenced under Section 304 the "district court is obligated upon a showing that the state has violated the plan, to issue appropriate orders for its enforcement" (*id.* at 173), regardless of whether EPA sought judicial enforcement under Section 113 of the Act, 42 U.S.C. 1857c-8 (*ibid.*). "[I]t is beyond serious dispute," said the court, "that the defendants are now almost a year in default in carrying out the principal strategies of the mandated Plan, which are central to achieving the primary ambient air quality standards prescribed by Congress, with the result that the public of New York City is exposed to carbon monoxide pollution that has in the meantime climbed to over five times the federal health standards. The court cannot consistently with its duty be a party to the delaying process that has led to this situation." *Id.* at 180. It remanded the case, ordered the district court to enter partial summary judgment for respondents and expeditiously

"take such further steps as are necessary to insure enforcement." *Ibid.*

4. On April 30, 1976, the district court ordered implementation and enforcement of appropriate portions of the Plan. In the interim, the City petitioners sought rehearing in the court of appeals "to raise constitutional issues with respect to the Plan which had not previously been considered" (Pet. App. I,[3] 6). On June 2, 1976 the court denied the petition (*id.* at 6-7):

> '[W]ithout prejudice to consideration by the United States District Court for the Southern District of New York of constitutional issues not decided prior to the entry of the order which was the subject of the notice of appeal * * * and without prejudice to the right of the defendants to move in the said District Court to set aside the order of the District Court dated April 30, 1976, on the aforesaid constitutional grounds.'

Thereafter the City petitioners moved the district court to vacate the partial summary judgment entered on April 30, 1976, and for summary judgment in the city's favor based on 10th Amendment infirmities.

On July 13, 1976, the district court granted the City petitioners' motion. *Friends of the Earth* v. *Carey*, 422 F. Supp. 638 (S.D. N.Y.). The court concluded that it could consider constitutional objections to the Plan raised by the City petitioners for the first time in this enforcement proceeding despite

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[3] "Pet. App." refers to the petition in No. 76-1718.

their failure to raise them under Section 307(b) within 30 days after the Plan was approved by EPA. *Id.* at 640-641.

On the merits of the City petitioners' contention, the district court examined cases presenting Tenth Amendment challenges by various state governments to transportation control plans (TCP's) prepared *for them* by the Administrator of EPA pursuant to Section 110(c)(1) of the Act, 42 U.S.C. (and Supp. V) 1857c-5(c)(1). *District of Columbia* v. *Train*, 521 F.2d 971 (C.A. D.C.); *Maryland* v. *Environmental Protection Agency*, 530 F.2d 215 (C.A. 4); *Brown* v. *Environmental Protection Agency*, 521 F.2d 827 (C.A. 9).[4] In general, these cases held that the Administrator was not authorized by the Clean Air Act to compel a State or municipality to implement certain aspects of an EPA-formulated TCP against polluters. The district court characterized the Plan here, although formulated by New York State, as the "functional equivalent of the suggestions of an interested party," and concluded that "approval of the plan was the functional equivalent of promulgation by the Administrator of his own plan." 422 F. Supp. at 645. Therefore, the court reasoned, although the New York Plan was formulated by the City and State, "it is in the same posture as a plan which the Administrator has promulgated" for a state under Section 110(c)(1) (422 F. Supp. at 645), and as in *Brown* v. *Environmental Protection Agency* and similar cases *supra*, the State and City cannot be compelled to implement the New York Plan pursuant to a citizen suit. *Id.* at 643.

[4] At the time of the district court decision, this Court had granted certiorari in each of these cases. On May 2, 1977, the judgments were vacated and the actions remanded for consideration of mootness, in light of EPA's representation that certain modifications to the regulations were necessary. *Environmental Protection Agency* v. *Brown*, Nos. 75-909, 75-960, 75-1050 and 75-1055. Those modifications have now been made. See 42 Fed. Reg. 30504 (June 15, 1977). The issues in *Brown* are now ripe for consideration by the courts of appeals and, if necessary, by this Court. The state petitioners in both *Brown* and *Maryland* have stated to the respective courts of appeals that the issues are not moot. Oral argument on both the question of mootness and the merits has been scheduled in *Brown*.

The court of appeals reversed (Pet. App. I). The court noted its decision to permit the City petitioners to raise "constitutional issues" but stated that in "so ruling we did not authorize the district court to engage in reinterpretation that would contradict our own prior considered construction of it or our determination as to the scope of enforceability." Pet. App. I, 6-7.

On the merits, the court of appeals characterized the district court opinion as having "emasculated the Plan as an enforceable instrument." Pet. App. I, 9. Its analysis began with the fact that the "State of New York, with the assistance of the Department of Air Resources of the New York City Environmental Protection Administration and other city agencies, prepared and promulgated the Plan here at issue * * *" (Pet. App. I, 13-14, and n. 3), and that the "State has not only failed to join the City in asserting the latter's defenses to enforcement of the Plan but,

to the contrary, has defended the Plan and concedes that it is enforceable against it." Pet. App. I, 30-31. The court concluded that the City petitioners were precluded from raising objections that could have been raised in a Section 307 petition for review. The court stated (Pet. App. I, 33-34):

> The purpose of § 307 was to assure that once an implementation plan had been promulgated by a state and approved by the EPA and a reasonable time had been allowed for affected parties to seek by way of a petition for review to have it modified or nullified, it would have finality and become enforceable. If states and their subdivisions, after preparing and through their responsible executives accepting the obligation of enforcing implementation plans under the Act, were allowed to disregard their commitments and to renege upon the obligations undertaken by them, the plans would amount to nothing more than voluntary, unenforceable declarations of principles. * * *
>
> In order to protect public health effectively Congress provided that such plans, after fair allowance for due process, would be enforceable. For these reasons § 307 has been upheld as a bastion of enforceability. See *Union Electric Co.* v. *EPA*, 44 U.S.L.W. 5060 (June 25, [1976]); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975); *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

The Court also questioned the propriety of the fact that the City was raising objections to the Plan it helped design, after remaining silent through the critical period of Plan approval by EPA and judicial review in *Friends I*.

> [T]he picture before us is one where the City, having voluntarily cooperated with the State in the drafting and promulgation of the very strategies now attacked by it, seeks in effect to renege on its own creation and commitment.
>
> The architects of the Plan were not Congress or the EPA but the State and City of New York. * * * In clear and unmistakeable [*sic*] terms the Plan obligates them to carry out the very strategies which the City now contends that it cannot be ordered to enforce [Pet. App. I, 35-36.]

To permit the City petitioners now to attack the validity of the Plan, the court stated, would be "directly contrary to our holding that 'acceptance by the EPA and judicial ratification by this court' resulted in the Plan becoming 'binding upon and enforceable against state and local officials' * * *." *Id.* at 44.

Despite the restrictions in Section 307, 42 U.S.C. (and Supp. V) 1857h-5, and the binding effect of *Friends I*, the court noted that the state possessed an available statutory remedy to deal with funding or personnel problems. "Should the State conclude that the Plan should be revised, it may submit such revisions as are necessary to the Administrator for approval under § 110(a)(3) of the Act." Pet. App. I, 42. See also *id.* at 43-45.

Finally, the court rejected the district court's conclusion that EPA's approval of a state-developed TCP was no different from EPA's promulgation of one (*id.* at 45). It stated (*id.* at 47-48):

> Although the district court here attempted to place the present case within the mold of *Brown, District of Columbia* and *Train*, the facts and the issues here are significantly different and clearly distinguishable. The most fundamental difference lies in the fact that, in contrast to those cases, the State here has clearly and unequivocally promulgated its own pollution-control plan which represents its own policy decision, formulated through public notice by the State to its citizens and local governments, and through State-conducted public hearings.

Nor did the court of appeals find this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833, an obstacle to citizen enforcement.

> The present case represents neither an interference with integral governmental functions of the City, nor a usurpation of State or City decision-making. On the contrary, the Plan reflects State and City policy decisions to be carried out by them according to their own dictates rather than those of the federal government. In formulating, proposing, and revising the Plan through public notice and public hearings, the State exercised its sovereign powers to make policy choices participated in by its citizens and its political subdivisions. [Pet. App. I, 52-53.]

EPA's approval of the Plan was mandatory once the criteria of the Act were met, and did not alter the substantive provisions of the Plan or affect the State's "policy choices" which resulted in those provisions. *Id.* at 53.

ARGUMENT

1. The petition in No. 76-1737 is jurisdictionally out of time under 28 U.S.C. 2101(c). The court of appeals denied rehearing on March 4, 1977. The time for filing a petition for a writ of certiorari was not extended and, accordingly, expired on June 2, 1977. The petition was filed June 6, 1977. Further references to "petitioner" or the "petition" in this brief refer to No. 76-1718.

2. Petitioners' contention (Pet. 5) that this case "presents the Court with the occasion to deal with the issues previously presented to it in *EPA* v. *Brown* and its companion cases * * * and upon which the Court did not finally decide" is incorrect.

First, no such issues can be reached at all unless this Court were to reject the holding of the Court of Appeals that the objections were made too late in light of Section 307 of the Act. See Point 3, *infra*. But, in any event, the *Brown* issue is not present here.

Brown and its kindred cases presented a significantly different issue: whether EPA could lawfully promulgate binding transportation control plans for states which had failed to prepare their own plans as required by Section 110, 42 U.S.C. (and Supp. V) 1857c-5. As this Court said in vacating and remanding the cases, "[t]hese cases * * * raise questions concerning the authority of the Administrator * * * to compel various types of implementation and enforcement actions by the States. * * * The critical fact about all the foregoing obligations was that they were imposed on the states, under 40 C.F.R. § 52.23, as elements of an applicable implementation

plan." Slip op. 1-2. Unlike the transportation control plan promulgated for California by the Administrator in *Brown, supra*, and its companion cases, the New York Plan was "prepared and promulgated" by the State of New York with the "cooperation and extensive effort" of City petitioners. Pet. App. I, 13-14, and n. 3. The issue of whether the federal government may "coerce" States and localities into implementing an EPA-prepared plan, allegedly in violation of the Tenth Amendment, is simply not present here.

Contrary to the district court's view, the fact that New York was required by Congress to adopt a plan does not reduce New York to a mere "interested party" in a federal proceeding, nor does it make this Plan indistinguishable from one imposed on a state by the Administrator. The narrow view of the district court entirely overlooks the fact that the Administrator is *required* to approve a State plan that conforms to the statute. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79. Unlike the situation in *Environmental Protection Agency* v. *Brown, supra*, New York here was "at liberty to adopt whatever mix of emission limitations it deem[ed] best suited to its particular situation." *Id.* at 79. It was given "virtually absolute power in allocating emission limitations so long as the national standards are met," *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246, 267, and so is in no position to claim that the EPA has imposed a plan upon it.[5]

[5] The court of appeals stated the "present case presents neither an interference with integral governmental functions of the City, nor a usurpation of State or City decision-making. On the contrary, the Plan reflects State and City policy decisions to be carried out by them according to their own dictates rather than those of the federal government." Pet App. I, 52-53. "Federal imposition of policy never took place in this case * * *." *Id.* at 59.

Instead, the court found the federal-state-local relationship in this case analogous to that envisioned in the Economic Stabilization Act of 1970, upheld in *Fry* v. *United States*, 421 U.S. 542, and distinguished by the Court in *National League of Cities, supra*. Pet. App. I, 57-60.

3. Petitioners further contend (Pet. 22-25) that the court of appeals erred in refusing to allow objections to the New York transportation control plan in this proceeding because petitioners failed to raise them in the manner prescribed by Section 307 of the Act. As we have noted, that was an independent ground supporting the court's judgment, which if correctly decided, alone disposes of petitioners' challenges to the plan.

In our view, the court of appeals rightly concluded that Section 307(b)(2) of the Act precludes petitioners from challenging the validity of the plan at this late date. See *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246; *Yakus* v. *United States*, 321 U.S. 414, 427-436.[6] Congress required that

[6] See also *Lloyd A. Fry Roofing Co.* v. *United States Environmental Protection Agency*, 554 F.2d 884 (C.A. 8); *Lubrizol Corp.* v. *Train*, 547 F.2d 310 (C.A. 6); *City of Highland Park* v. *Train*, 519 F.2d 681 (C.A. 7), certiorari denied, 424 U.S. 927; *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F.2d 654, 661 (C.A. D.C.); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 512 F.2d 1351 (C.A. D.C.); *Granite City Steel Co.* v. *Environmental Protection Agency*, 501 F.2d 925 (C.A. 7); *Plan for Arcadia, Inc.* v. *Anita Associates*, 501 F.2d 390, 392 (C.A. 9), certiorari denied, 419 U.S. 1034; *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301-1305 (C.A. 10); *Getty Oil Co. (Eastern Operations)* v.

challenges to the validity of a transportation control plan be raised promptly "[i]n order to maintain the integrity of the time sequences provided throughout the Act." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970). Cf. *Yakus* v. *United States*, *supra*, 321 U.S. at 439.

The court found the application of the principle underlying Section 307(b)(2), 42 U.S.C. (and Supp. V) 1857h-5(b)(2), particularly relevant to the conduct of petitioners, who "cooperated with the State in the drafting and promulgation of the very strategies now attacked by [them]". Pet. App. I, 35. They devised a plan which "[i]n clear and unmistakeable [*sic*] terms * * * obligates them to carry out the * * * strategies * * *. Indeed, the Plan repeatedly refers to and lists the different State and City departments and agencies that are to implement these strategies * * *" (*id.* at 36). "[T]he Plan itself makes it clear beyond any reasonable doubt that both the State and City represented that their responsible officials would carry out each of the detailed strategies outlined in the Plan, using the State and City personnel and facilities described in the plan." *Id.* at 42-43.

Ruckelshaus, 467 F.2d 349, 359 (C.A. 3), certiorari denied, 409 U.S. 1125; *United States* v. *Adamo Wrecking Co.*, 545 F.2d 1 (C.A. 6), certiorari granted April 4, 1977, No. 76-911. Courts applying the parallel judicial review provision of the Federal Water Pollution Control Act also have held that review must be had promptly or not at all. See *Sun Enterprises, Ltd.* v. *Train*, 532 F.2d 280, 287 (C.A. 2); *E. I. du Pont de Nemours and Co.* v. *Train*, 528 F.2d 1136, 1137 and n. 1, 1142 (C.A. 4), affirmed on other grounds, No. 75-978, February 23, 1977; *Peabody Coal Co.* v. *Train*, 518 F.2d 940 (C.A. 6).

Moreover, petitioners failed to pursue their opportunities to avoid their obligations either by advising the Administrator before Plan approval in 1973, or by petitioning for review pursuant to Section 307(b)(1). Petitioners also could have raised "defenses" or objections by intervention or *amicus curiae* participation in *Friends I*, or in the subsequent district court enforcement proceeding, *Friends of the Earth* v. *Wilson*, 389 F. Supp. 1394 (S.D. N.Y.). Instead, the City told the district court it was "in compliance with the plan"; that enforcement should not occur because of "necessary expense and diversion of manpower during the present hiring freeze"; and because the issues were "highly technical." *Id.* at 1395-1396. It was not until four years after EPA approval that the petitioners first sought to raise their present "defenses" to a plan the court of appeals had previously concluded in *Friends I* was "binding upon and enforceable against state and local officials" (Pet. App. I, 42-45).

4. Petitioners are not without recourse, however. Contrary to petitioners' assertions (Pet. 24-25), the Clean Air Act does not "bind a State and its subdivisions to their initial voluntary commitments, notwithstanding that significant changes may thereafter occur * * *." Section 110(a)(3), 42 U.S.C. (and Supp. V) 1857c-5(a)(3), provides a mechanism that permits a revision of the Plan on the State's initiative. As this Court noted in *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 80, the revision section is "the mechanism by which the States may obtain approval of their developing policy choices

as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards." Thus, the State has complete discretion in proposing substantive revisions to the Plan if it thinks "significant changes" have occurred since the Plan's approval.[7]

Thus, the substantive objections raised by petitioners can be embodied in proposed revisions to the Plan and submitted to EPA; the Agency action would then be subject to a timely petition for review under Section 307.[8]

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

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[7] To date, the State of New York has chosen not to seek a revision of the Plan; on the contrary, the State has defended the validity of the TCP and has acknowledged its obligation to implement its provisions. Pet. App. 13-14 and n. 3.

[8] Petitioners' objections (Pet. 14-19) to the district court's order following the remand in this case (Pet. App. IV, 79-163) have not yet been presented to the court of appeals and thus are not properly before this Court.

APPENDIX

Relevant provisions of the Clean Air Act, 77 Stat. 392, as amended and added, 42 U.S.C. (and Supp. V) 1857 *et seq.* provide:

Section 107(a) of the Act, 42 U.S.C. 1857c-2(a):

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 110(a), (c) of the Act, 42 U.S.C. (and Supp. V) 1857c-5(a), (c):

> **(a) Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator.**
>
> (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine

months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attain-

ment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for inter-governmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such other sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards es-

tablished pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h-1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plan and re-

port to the State on whether such plans can be revised in relation to fuel burning statutory sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 1857c-6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as

may be necessary to permit the State to make a determination under clause (A).

* * * *

(c) Preconditions for preparation and publication by Administrator of proposed regulations setting forth an implementation plan; hearings for proposed regulations; promulgation of regulations by Administrator; transportation regulations study and report; parking surcharge; suspension authority.

(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six

months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge

regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

Section 304 of the Act, 42 U.S.C. 1857h-2:

(a) Establishment of right to bring suit.

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amend-

ment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) Notice.

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States

any person may intervene as a matter of right.

(2) under subsection (a)(2) of the section prior to 60 days after the plaintiff has given notice of such action to the Administrator.

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 1857c-7(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 1857c-8(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator.

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) Award of costs; security.

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Non-restriction of other rights.

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Definition.

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

which is in effect under this chapter (including a requirement applicable by reason of section 1857f of this title or under an applicable implementation plan.

Section 307 of the Act, 42 U.S.C. (and Supp. V) 1857h-5:

(a)(1)[1] In connection with any determination under section 1857c-5(f) or section 1857f-1(b)(5) of this title, or for purposes of obtaining information under section 1857f-1(b)(4) or 1857f-1(c)(4) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may

[1] So in original, Subsec. (a) was enacted without a par. (2).

administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 1857f-1(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b)(1) A petition for review of action of the Administrator in promulgating any national pri-

mary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857 f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings or enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for

the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

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